No. 76-1415

In the Supreme Court of the United States

OCTOBER TERM, 1977

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1d-9d) is reported at 546 F. 2d 989. The supplemental decision and order of the National Labor Relations Board (Pet. App. 1c-19c) are reported at 223 NLRB 752. The court of appeals' earlier decision remanding to the Board for clarification (Pet. App. 1b-24b) is reported at 512 F. 2d 564. The Board's original decision and order (Pet. App. 1a-86a) are reported at 208 NLRB 184.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10d-11d) was entered on November 9, 1976, and petitioner's

timely petition for rehearing was denied on January 13, 1977 (Pet. App. 1e-2e). The petition for a writ of certiorari was filed on April 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the owner-operators of moving vans under contract with a moving company are independent contractors, rather than employees of the company.

2. Whether substantial evidence supports the Board's findings that the union violated the secondary boycott provisions of the National Labor Relations Act by attempting to enforce an agreement requiring the moving company to cease doing business with the owner-operators unless they became members of the union.

STATUTE INVOLVED

The relevant provisions of Sections 2 and 8 of the National Labor Relations Act, as amended, 29 U.S.C. 152 and 158 (61 Stat. 137, 140, 73 Stat. 525, 542), are set forth in the appendix to the petition, pp. 1f-3f.

STATEMENT

A. Initial Proceedings

1. Santini Brothers., Inc. ("the Company" or "Santini") engages in local and long distance moving of household goods and office equipment. For its local operations, Santini uses its own moving vans and employs drivers who are represented by petitioner (herein "the Union") (Pet. App. 3a). For long distance moving, Santini has, since 1962, contracted individually with a number of

owner-operators,[1] who load, haul, and unload the shipments from point of origin to destination for a percentage of the moving charges, which are established by the Interstate Commerce Commission (Pet. App. 3a-10a).

Pursuant to Article 24[2] of its 1971-1974 collective agreement with Santini (Pet. App. 22a-24a), the Union insisted

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[1]Owner-operators own their own tractors or power units, but, with few exceptions, the Company supplies the trailers. Most owner-operators drive their own tractors, but some employ drivers in carrying out their contracts with the Company (Pet. App. 29a-30a).

[2]As described by the Administrative Law Judge (Pet. App. 65a-66a). Article 24 provides:

> that any person doing long distance driving under contract with an employer covered by the union contract, whether as owner-operator or commission driver or otherwise, shall be covered by the union contract as an employee, called contract employee. However, it is further provided that, except for the specific provisions of the article, the details of economic and other arrangements between the contract employees and the employer shall be the subject of the individual contracts between them.
>
> The specific provisions of article 24 make applicable to the contract employees the union security, union checkoff, pension and welfare, no-strike, grievance and arbitration, and separability clauses of the union contract. However, the employer is to compensate the contract employees under a "separate check" system and is to provide them social security, workmen's compensation, and unemployment insurance benefits under the separate compensation system. There is reserved for the employer the right, consistent with its agency van line agreement, to control the manner of performance of contract employees, and to assign work in a way that attempts to reconcile equal earnings opportunity with seniority, qualifications, equipment capabilities, and agency van line agreement. First-in-first-out dispatch is stipulated not to be a violation of equal earning opportunity. Lastly it is provided that the agreement (under the article) shall not be used to deplete the number of regular long distance employees, as distinguished from contract employees, presently employed by covered employers.

on enforcement of the union security provision requiring owner-operators to become and remain union members. The Union struck to enforce its demand and Santini required the owner-operators to join the Union as a condition to loading in New York (Santini's principal place of business). Thereupon, unfair labor practice charges were filed by certain of the owner-operators. (Pet. App. 3a-4a.) Rejecting the Union's contention that the owner-operators were employees under the Act, the Board found that they were independent contractors and that the Union's attempts to require their union membership as a condition of doing business with the Company violated Section 8(b)(4) and 8(e) of the Act (Pet. App. 82a).

2. The Board's findings are based on the following facts.

The owner-operators are required by applicable Department of Transportation regulations to reserve their tractors for Santini's[3] exclusive use. However, they may without penalty refuse to accept offered loads and may hire drivers to operate their equipment leased to Santini (Pet. App. 30a-31a and n. 14, 62a).

After a shipper requests Santini's services, Santini employees estimate the cost of the move and set the pickup date (Pet. App. 33a-35a). However, after the owner-operator accepts a given order, he has full responsibility for the operation. He hires and supervises his own employees, both at the point of origin and delivery, to assist in packing, loading, unloading and over-the-road driving.[4] (Pet. App. 35a-36a.) The owner-operator selects his own routes for delivery, sets the work hours for himself and his helpers, and bears the expenses incident to the job, such as packing materials, fuel, weighing, tolls, and overnight accommodations (Pet. App. 36a-37a, 39a, 63a). The owner-operator pays his own helpers, is responsible for withholding their social security and income taxes, and provides liability insurance and workmen's compensation for them (Pet. App. 38a). He also is responsible for costs due to damage or loss of household goods which he transports (Pet. App. 62a).

[3]Santini operates under a franchise arrangement with United Van Lines, a nationwide operator, in states where Santini does not have requisite authority to operate (Pet. App. 13a-14a). Except where otherwise noted, the description herein applies to both companies' method of operation.

The owner-operators receive a percentage of the contract price, usually 50 percent (Pet. App. 31a-32a). They have no minimum income guarantee and receive no other form of compensation (Pet. App. 33a). Unlike Santini's local drivers, they receive no social security, workmen's compensation, retirement, or any other type of employee benefit from the Company (Pet. App. 38a-39a). The owner-operators bear the maintenance and repair costs for the trailers owned by them, the cost of garaging, and road use taxes (*ibid.*).

Santini provides no supervision of the owner-operators beyond the requirements imposed by the Interstate Commerce Commission and the Department of Transportation (Pet. App. 61a, n. 18).[5] It exercises no disciplinary control over the owner-operators; no suspensions are imposed. Termination of the contract is the sole recourse

[4]The owner-operators may hire loading helpers from any available source, except that in New York, because of its contract with the Union, Santini requires them to select helpers from Santini's roster (Pet. App. 35a).

[5]Government regulations, for example, require periodic inspection of equipment, limited driving hours, and daily logs and accident reports (Pet. App. 36a, 40a-42a).

for violation of applicable regulations.[6] (Pet. App. 42a-43a.)

3. In concluding that the owner-operators were independent contractors rather than employees, the Administrative Law Judge, whose decision was adopted by the Board, stated (Pet. App. 47a):

> Central to this conclusion is the net total of the evidence that each of the contractors has within his own control the means of performing the contracted moving services and the method of performance, unsupervised in execution by the carrier whose business he performs. The restrictions upon him are largely those imposed by law on the governmentally regulated business of moving household goods by motor carrier, both with regard to consumer protection and highway safety.

He pointed out, citing *Local 814, International Brotherhood of Teamsters (Molloy Brothers Moving and Storage, Inc.)*, 208 NLRB 276 (see also discussion *infra*, pp. 9-10), that, in cases where the Board has found owner-operators to be statutory employees, there has existed "a layer of carrier regulations put upon the contractor beyond what was required by government regulations, impairing the contractor's independence" (Pet. App. 60a-61a, n. 18).

The Administrative Law Judge also found that (Pet. App. 62a):

> [T]he Santini contractors have all of the entrepreneurial indicia of investment in the ownership of expensive power units, in some cases multiple units

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[6]United conducts an optional "refresher" training program for its permanent lease drivers and publishes a manual which employees are free to use as they see fit (Pet. App. 45a-46a, 64a).

> and ownership of trailers as well, and shoulder all of the costs and arrangements of their operation and maintenance and the risks and costs of damage, including loss or breakage of the household goods in their care.

Turning to the contention that the requirement that the owner-operators be required to join the Union violated Section 8(e) of the Act, the Administrative Law Judge stated (Pet. App. 66a-67a):

> The inquiry, then is whether the object of the Union's conduct and of the agreement respecting the contract drivers (article 24) was "primary"—intended to preserve fairly claimable unit work to unit members in the employ of the contracting employer—or "secondary"—aimed at regulating the labor policies of other employers including self-employed persons. If the object was primary, the agreement did not violate Section 8(e) of the Act, even if its incidental effect caused the employer to cease doing business with other persons; whereas if the purpose was secondary, such as limiting subcontracting to employers who recognize the union or who are signatory to a contract with it or who are members of it, the agreement was unlawful and a violation of Section 8(e) * * *.

The Administrative Law Judge found that the Union's object in Article 24 was not to recapture lost work for bargaining unit employees, as the Union contended, but was to further the Union's institutional interests in acquiring new members. Thus, he pointed out (Pet. App. 72a-73a):

> [A]part from talk by a union lawyer at the Industry-Union negotiation about seeking to recapture bargaining unit work, * * * for a number of years (since

at least 1967) there has been no body of bargaining unit employees, including Santini employees, who have performed long distance moving or for whom to preserve or recapture the long distance household moving business. As developed by the record of this case, the plain fact is that in New York City, at least, the moving business has undergone several gradual changes over a period of years and, among these, has turned for long distance performance to a new breed of small independent businessmen, frequently not based in New York, and capable and willing to move constantly about the country with their own power units. The New York City Industry bargaining unit employees have apparently adjusted to the changes without economic loss, acquiring increased local work (and possibly more desirable work than long distance hauling from the standpoint of a local employee).

Therefore, the Administrative Law Judge concluded that Article 24 violates Section 8(e) of the Act (Pet. App. 77a) by requiring the employer to cease doing business with non-union owner-operators. He further concluded that the Union's attempts to secure compliance with Article 24 through strike pressure and threats of such pressure violated Section 8(b)(4)(A) and (B) of the Act (Pet. App. 81a-82a).

4. The court of appeals agreed with the Board that, if the owner-operators were independent contractors, Article 24 is "clearly a union signatory agreement violative of sections 8(b)(4) and 8(e)" (Pet. App. 6b). The court stated (Pet. App. 5b-6b):

> [The Union] contends * * * that * * * Article 24 is a legitimate work preservation clause. We cannot agree. As written, Article 24 neither establishes union work standards for the subcontracting of work nor requires that specific work be done by members of the bargaining unit. Rather, Article 24 purports to require the owner-operators to join the union by defining them as "employees," and hence subjecting them to the union security agreement.

However, the court remanded the case to the Board for clarification of why it had reached a different result here than in *Molloy, supra,* where the Board had found owner-operators of another employer in the same bargaining unit to be employees (Pet. App. 8b).[7]

B. Proceedings After Remand

On remand, the Board (Members Fanning and Jenkins dissenting) affirmed its prior decision. It noted that the Board "has often stated that it will apply the right-of-control test and in doing so will take into account all the factors bearing on [the owner-operators'] status" (Pet. App. 3c). "The basic standards for determining employee * * * status are well settled and need not be debated" (Pet. App. 7c, n. 9).

The Board held that the Administrative Law Judge had correctly found that *Molloy* was distinguishable from *Santini* in that "there was a layer of carrier regulation put upon the (owner-operators) beyond what was required by governmental regulation, impairing the (owner-operators') independence" (Pet. App. 4c-5c; see

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[7] Chief Judge Bazelon, although agreeing that Article 24 was a union signatory clause, disagreed with the scope of the remand. He would have mandated a thorough explication of the standards applicable to determining employee or independent contractor status under the Act (Pet. App. 9b-24b).

supra, p. 6).[8] Thus, Molloy had mandatory training programs and working procedures that had no counterpart in Department of Transportation regulations; employees were supervised in loading and unloading and disciplined for failing to follow procedures; Molloy required drivers to check in with its affiliate dispatcher at their destination; and it did not allow drivers to refuse loads (Pet. App. 5c-6c).

The Board also found that Santini's owner-operators assumed greater entrepreneurial risk than did those of Molloy in that 1) Santini's owner-operators themselves pay for any health insurance they may carry, whereas Molloy assumed the costs of health insurance for the owners; 2) the owner-operators contracting with Santini bear the costs and incidents of operation and the Company does not advance trip expenses, whereas Molloy alone bears the risk of any default by a customer in payments for services rendered by owner-drivers, and it advances trip expenses from a reserve account accumulated from the owner-operators' commissions; 3) Molloy established a profit-sharing plan for the owners, while Santini has no similar arrangement; and 4) only when Santini converted to the contracting method of long-distance moving did it loan the operators money to buy trucks, and these loans were paid off by 1973, while Molloy has made loans to owners in substantial amounts for various purposes (Pet. App. 6c).

The court of appeals (Chief Judge Bazelon dissenting) upheld the Board's supplemental decision, noting that the

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[8]As the Board stated in *Molloy*, there was "pervasive control over the [owner-operators'] mode of operation, particularly their on-the-job training, their procedures in loading and unloading cargo, their dealings with customers, and * * * such control exceed[ed] governmental requirements to a significant degree." 208 NLRB at 279.

Board's articulation of the factual distinctions between its two decisions showed that Molloy Brothers exercises greater control over its owner-operators than Santini Brothers (Pet. App. 3d).

It ordered enforcement of the Board's decision and order, after holding that (Pet. App. 5d):

> The distinctions detailed in the Board's Supplemental Decision show that the NLRB has considered the facts in each case and finds them distinguishable, thereby warranting different results. We find that the Board has exercised its judgment and engaged in reasoned analysis in arriving at the different results in *Santini* and *Molloy*.

ARGUMENT

1. Petitioner contends that the present decision conflicts with the Board's decision in *Molloy, supra* (Pet. 24-25) and that "looking at the essence of the relationship" the owner-operators clearly are employees of Santini (Pet. 17). Petitioner argues that even if the present case and *Molloy* differ in some respects, the distinctions upon which the Board relied in deciding these cases differently were not adequately "explain[ed] in terms of the policies of the Labor Act" (Pet. 25, 27).

This Court established in *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254, 256, that common-law agency principles are to be used in distinguishing between employees and independent contractors under the Act. It noted that "independence" and "initiative and decision-making authority * * * [are] normally associated with an independent contractor" (*id.* at 258). It cautioned, however, that "[t]here are innumerable situations * * * where it is difficult to say whether a particular individual is an employee or an independent

contractor" and that in such cases "there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive" (*ibid.*).

Following the direction in *United Insurance*,[9] the Board assessed and weighed the incidents of the relationship between the owner-operators and Santini, applying common-law principles. It concluded, primarily on the basis of the absence of supervision or control by Santini over the owner-operators' methods of operation, other than those required by government regulation (Pet. App. 47a), and the entrepreneurial character of their operations (Pet. App. 62a), that the owner-operators were independent contractors. Applying these same standards—the existence of carrier regulation beyond what is required by government regulation (Pet. App. 60a-61a, n. 18; 4c-6c) and entrepreneurial risk (Pet. App. 6c)—the Board determined

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[9]Contrary to petitioner's contention (Pet. 21-23), the Board's decision here does not conflict with *United Insurance, supra*. There the debit agents, who were held to be employees by the Court, were under constant supervision in virtually every aspect of their jobs; their basic "tool"—a debit book listing policyholders—was owned by the employer; they received bonuses, benefits, vacations, group insurance, and profit-sharing, none of which is received by Santini's owner-operators; and the agents were subject to reprimands, discipline, and discharge (390 U.S. at 257-259).

The Court found the following statement made by the chairman of the board of United Insurance the "best summation of what these factors mean": "'if any agent believes he has the power to make his own rules and plan of handling the Company's business then that agent should hand in his resignation at once'." (*id.* at 259). No similar rigid requirement to follow company rules and plans—other than those required by federal law—exists in this case.

that the owner-operators in *Molloy*, by contrast, were employees.[10]

This Court, in *United Insurance, supra*, articulated the standard for review of the Board's determinations as to independent contractor status. That determination (390 U.S. at 260) "should not be set aside just because a court would, as an original matter, decide the case the other way"; rather, "the Board's choice between two fairly conflicting views" should be sustained. The court of appeals, applying this standard of review, held (Pet. App. 5d) that the Board in this case had exercised its judgment and engaged in a "reasoned analysis" in distinguishing between *Molloy* and *Santini*, and in concluding that the owner-operators in the present case are independent contractors.

Plainly, this issue does not warrant further review by this Court, since it presents only the essentially factual question whether the Board correctly determined that the owner-operators in the present case, unlike those in *Molloy*, are independent contractors.

2. Petitioner also contends (Pet. 28-30) that the court below erred in finding that Article 24 of the collective bargaining agreement was a union signatory agreement in violation of Section 8(b)(4) and 8(e) of the Act.

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[10]Petitioner also asserts (Pet. 25-27) that the Board's opinion conflicts with prior Board decisions other than *Molloy*. In *Ace Doran Hauling & Rigging Co.* v. *National Labor Relations Board*, 462 F. 2d 190 (C.A. 6), enforcing 191 NLRB 428, however, the carrier conducted road checks, required inspections every 30 days, controlled the drivers' routes in some instances, terminated leases if the operators declined loads for a period of time, and disciplined or discharged drivers for accidents or violations of I.C.C. rules (462 F. 2d at 192). Similarly, in the other cases cited (Pet. 27), there was, as the court noted in *National Labor Relations Board* v. *Deaton, Inc.*, 502 F. 2d 1221, 1226 (C.A. 5), certiorari denied, 422 U.S. 1047, substantial evidence of "additional controls" beyond those which are "federally-mandated."

In *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612, 644, this Court held that the determination whether an agreement restricting business relations between two persons violates Section 8(e) of the Act turns on "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the unit] employees, or whether the agreements * * * were tactically calculated to satisfy union objectives elsewhere" (footnote omitted). See also *National Labor Relations Board* v. *Enterprise Association of Pipefitters*, 429 U.S. 507. If the agreement has the former objective, it is primary and lawful; if it has the latter objective, it is secondary and unlawful. As the court below stated in its initial opinion, agreements which require "that specific work be done by members of the bargaining unit" or only in accordance with "union work standards" are primary, but those which restrict work opportunities to union members are secondary (Pet. App. 6b). See also *National Labor Relations Board* v. *National Maritime Union of America, AFL-CIO*, 486 F. 2d 907, 913, 914 (C.A. 2), certiorari denied, 416 U.S. 970.

Petitioner's objection to the Board's findings of violations of Section 8(b)(4) and 8(e) presents only the question whether the Board properly concluded that the prinicipal thrust of the contract provision was to expand the Union's membership rather than to preserve work opportunities for the unit members. That issue, which involves only the application of settled principles to particular facts, does not warrant review by this Court. In any event, the circumstances relied on by the Board fully support its conclusion that Article 24 had an unlawful

secondary objective.[11] As the Board found, there have been no bargaining unit employees, including Santini employees, who have performed long distance moving for a number of years. Accordingly, there were no employees for whom to preserve or recapture the long-distance household moving business, and the effect of the clause was therefore to expand union membership.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11]Contrary to petitioner's contention (Pet. 29), the Board has accepted the Third Circuit's views in *A. Duie Pyle, Inc.* v. *National Labor Relations Board*, 383 F. 2d 772, certiorari denied, 390 U.S. 905, which support the finding in this case. In addition to the instant case (Pet. App. 73a-76a, 6b), see, *e.g.*, *Newspaper & Periodical Drivers & Helpers Union, Local 921, Teamsters*, 204 NLRB 440, 441, enforced, 509 F. 2d 99, 100 (C.A. 9), certiorari denied, 423 U.S. 831.

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